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Nos. 5 & 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

HOTEL EMPLOYEES UNION, LOCAL NO. 255, ET AL.,
Petitioners

v.

SAX ENTERPRISES, INC., ET AL.; HARRY LEVY, ET AL.,
DOING BUSINESS AS SHERRY FRONTENAC HOTEL, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' brief does not, as we read it, seriously dispute much of the argument presented in our opening brief. It does make, however, certain assertions which we believe require comment.

1. The question of violence or "near violence."

At pages 11-12 of their brief, respondents cite a series of items extracted from the supplemental record in an effort to show that the picketing in these cases was accompanied by violence. In their argument they urge, at pages 29-31, that the final injunctions in all 22 cases decided simultaneously by the Supreme Court of Florida were affirmed by that court because the picketing was accompanied by acts of violence or "near violence."

Without inquiring what "near violence" may be (cf.

Teamsters Union v. *Newell,* 356 U. S. 341) it is a sufficient answer to this material that in none of the cases now before this Court did either a trial court or the Supreme Court of Florida find that there was such violence (or near violence) as would justify a restraint against peaceful picketing. Indeed, in only three of the cases now before this Court did the respondents even offer testimony in support of a claim that picketing could be enjoined on any such basis: the Saxony, the Sans Souci and the Sherry Frontenac,

In the Saxony case the trial court found that there was insufficient evidence to justify a restraint against picketing on the basis of the claim of violence. (R. 14) On certiorari, the Supreme Court of Florida upheld that finding, stating that there was an "insufficient showing to reverse the Chancellor on the question of whether or not picketing the Saxony Hotel was accompanied by violence." (R. 17) Four of the instances of violence cited by the respondents on pages 11-12 involve testimony offered in support of the proposition that the picketing at the Saxony was accompanied by violence.

The same result was reached at both judicial levels in the Sans Souci and the Sherry Frontenac cases (R. 14, 272, 551) as well as in four other cases not here for review, the Roney-Plaza, the Sorrento, the Algiers, and the Monte Carlo. Five of the instances of alleged violence listed on pages 11 and 12 of respondents' brief involved picketing at those hotels.

In the other nine cases here for review, there was not even an attempt to prove violence or "near violence." In some of them, the plaintiffs alleged violence or what might be called "near violence." (Lombardy, R. 583; Miami Colonial, R. 664; Nautilus, R. 809; Delmonico, R. 829; President Madison. R. 887) In others, they alleged that the defendants had engaged in violence at "other hotels." (Versailles, R. 306; San Marino, R. 407; Robert Richter, R. 920; Martinique, R. 1050) In none of these cases, however, did they offer any evidence in support of those allegations, and in none of them did the trial courts issue injunctions based upon

the claim of violence, or near violence, at the hotel concerned or elsewhere.

There were three cases of the 22 decided simultaneously by the Supreme Court of Florida in which there had been a finding that picketing should be enjoined because of violence. Those three involved the Casablanca, the Sea Isle, and the Empress. None of them is here for review.[1]

It is now contended by appellants, however, that the hotels were so close to each other and the cases so inter-related that the Supreme Court of Florida, in finally affirming the injunctions in each of the 22 cases on the authority of the *Fontainebleau* case, based its decision, in each case, on the existence of "violence or near violence" in these three cases.

This is nonsense. It is impossible, first of all, to read the *Fontainebleau* opinion as being based on any conclusion that there was a "background of violence" in that case. A reading of the whole opinion in that case, which is reprinted in Appendix A of our opening brief, clearly negatives the inference which the respondents seek to draw from the sentences which they quote. Secondly, on the prior appeals to the Supreme Court of Florida in these cases respondents had urged, on the basis of the very evidence in the supplemental record now relied upon, that there was a "background of fear, intimidation, coercion, and force." (R. 269) But the Supreme Court of Florida had rejected that contention and had made it clear that the injunctions which it directed be issued were not based upon any such theory. Finally, respondents did not argue, in the briefs covering the 22 cases in the Florida Supreme Court, that the injunctions in all of the

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[1] Agreements have been reached between the union and the hotel management at the Sea Isle and Empress. See Point 5, below. Most of the evidence involving the Casablanca is contained in the supplemental record. Although we believed, and still believe, that the evidence was not sufficient to warrant an injunction against all picketing at that hotel, we deliberately chose not to seek review of the injunction in that case in order to avoid any possible contention that we were asking the Court to reverse a finding of fact made by the Florida courts.

cases could be sustained because of the claimed violence in 3 of them. To the contrary, they argued that the earlier decisions constituted "the law of the case" (R. 64-68, 1019-1021) and that picketing was properly enjoined for failure to meet the requirements for peaceful picketing set forth in the Saxony and Boca Raton opinions. Only the injunction in the Empress Hotel case was sought to be sustained on the violence theory.[2]

2. The suggestion that the claim of preemption was not properly raised in the trial court.

Respondents argue, at pages 25-26, that the Union did not properly raise the claim in the trial courts that state jurisdiction was preempted by the National Labor Relations Act. This contention can only be made as to four of the cases here for review.

In three cases—the Sans Souci, the Sherry Frontenac and the Lombardy—it was discovered when the records were being made up for appeal to the Supreme Court of Florida that the supplemental answers raising this jurisdictional issue were missing, although the parties had stipulated as to the method by which the trial courts could determine that issue. Counsel for the respondents then entered into a stipulation with counsel for petitioners that such supplemental answers had in fact been filed in the trial courts in these cases on June 28, 1955, and that such supplemental answers should be considered as having been filed June 28, 1958, "as a predicate for the affidavit [as to interstate commerce] attached to the Stipulation r. Final Hearing," already contained in the record. (R. 284, 564, 648).

Counsel for respondents also contend that in the Saxony,

[2] The brief filed in the Supreme Court of Florida by the counsel who represented 17 of the 22 hotels, including the Casablanca and the Sea Isle, did not even rely upon violence as a ground for sustaining the injunctions in those two cases. (R. 64-78) The brief filed by the counsel who represented 3 of the remaining hotels, including the Empress, did rely upon violence as a ground for sustaining the injunction in that case. (R. 1031-1040)

as well as in the three cases in which the stipulations above referred to were executed, the supplemental answers were "out of turn" because filed more than 20 days after the original answer had been served, without leave of court or written consent of the adverse party having been obtained, as required by Florida Rules of Civil Procedure, Rule 1.15.[3]

The same contention is apparently also made as to all of the remaining cases, except the San Marino and the Versailles, but the record clearly shows that the supplemental answers in those remaining cases, as well as in the San Marino and the Versailles, were filed within the period permitted for amending pleadings by the Florida rule. (R. 831, 845; 889, 896; 956, 996; 1062, 1082)

These procedural contentions do not even deserve reply. Counsel for the respondents have not previously suggested, in any court, that the issues tendered by the supplemental answers in these four cases were not squarely joined in the trial courts or in the Supreme Court of Florida. In each case, including the three in which the supplemental answer originally filed was lost, counsel for the respondents—*before final hearing*—entered into a stipulation in the trial court that at the final hearing, the union would produce a witness who would testify that the hotel concerned was engaged in a business affecting commerce, that the sales of the hotel in interstate commerce exceeded the amount necessary to establish jurisdiction of the National Labor Relations Board, that the hotel purchased numerous items from outside the State of Florida, and that it made sales directly outside the State of Florida.[4] In each of the four, the respondents stipulated that the only objection they would make to such evidence was that it was immaterial and irrelevant. The stipulation further provided that the testimony, and the objection, would be submitted to the Chancellors for ruling

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[3] This rule is identical with Rule 15 of the Federal Rules of Civil Procedure.

[4] R. 37, 288, 568, 651.

thereon, and that the Chancellors could enter final decrees "upon the record as now made in the light of this Stipulation." [5] In each of the four, the trial court in its final decree, sustained the objection.[6]

Surely, respondents could not have been heard to contend in the Supreme Court of Florida that there was a procedural defect, unmentioned to this point, which prevented the question from being reviewed there. Any defect was surely cured by the stipulations as to final hearing. And, even if it was not so cured, it is elementary law in Florida, as elsewhere, that procedural errors not raised below which do not prejudice the rights of any party cannot be raised on appeal. *City of Winterhaven* v. *State ex rel. Groves Corp.,* 114 Fla. 93, 153 So. 92; *In re Johnson,* 24 So. 2d 711; *Caldwell* v. *Peoples Bank,* 73 Fla. 1165, 75 So. 848, 852. And, of course, counsel for respondents did not rely in the Supreme Court of Florida on any such procedural error to avoid the issue raised by the supplemental answers. To the contrary, they briefed the issue on the merits in that court. (R. 77-78, 1040-1043) Any possible right which they might have had to rely on procedural deficiencies in the filing of papers in the trial courts was therefore clearly waived.

3. The suggestion that the Supreme Court of Florida concluded that the Union did not represent the employees.

In their brief, respondents state flatly that the "Supreme Court of Florida concluded that the union did not represent the employees" at the hotels here involved (Respondents Brief, pp. 16-17, 23) and repeat the section of their brief in the Supreme Court of Florida in which they made such a contention to that court.

So far as we have been able to determine, the question of how many employees actually wished the union to represent them was not regarded as material by the Supreme Court of

[5] R. 36, 287, 567, 650.
[6] R. 53, 291, 570, 654.

Florida. This was so because, under Section 447.03 of the Florida statute, all employees are entitled to bargain collectively, and there is no provision that the representative chosen by the majority represents all of the employees. A minority of the employees in a given unit is, therefore, entitled to bargain through a union, and picketing in support of a union demand for such bargaining is permissible. *Johnson* v. *White Swan Laundry,* 41 Co. 2d 874 (1949).

In the second *Boca Raton* opinion, the Supreme Court made it clear that this remained the rule. The critical requirement for picketing, as expressed by the Florida Supreme Court in that opinion, was that the "union must establish by some evidence of substantial character that *at least some of the employees* have chosen it as their representative and 'afford to the employees a fair opportunity to engage in negotiations.'" (R. 281, 561, emphasis added.) The picketing was held unlawful in that case because the union had not "first . . . submitted to the petitioner competent substantial evidence of their authority as alleged bargaining agents." (R. 283, 563) In the *Fontainebleau* case the court specifically said that "no such requirement [for a majority vote] exists as to picketing." (Petitioners' Brief, Appendix A, page 50.)

While the respondents' assertion that only one, two, or three of the employees had "designated the union" in some of the cases prior to the picket line is therefore immaterial, we think that the process by which the respondents reach this conclusion may be of interest to the Court.

At the hearing on the motion to vacate the preliminary injunction in the Sherry Frontenac case, the union produced three witnesses who testified that they were members of Local 255, that they desired Local 255 to represent them, that they had walked off their jobs on April 16, 1955, as part of the strike called by the union and that they did so voluntarily. It was then stipulated that 47 other witnesses who were present in the courtroom and whom the union

proposed to put on would testify similarly. (R. 141-159) In the Sans Souci case, the total number of employees so shown to have supported the union was 57. (R. 173-181)

How then can respondents claim that only one employee at the Sherry Frontenac, and only two at the Sans Souci, had "designated the union prior to the picket line"? The answer is simple. At the hearing, the respondents contended that if an employee who testified had signed a card designating the union as his bargaining agent, the card was the "best evidence." (R. 115-116, 129) The card which the employee had signed was therefore introduced. Many of the cards so introduced did not specify Local 255 but another local of the Hotel Employees' Union or the Miami Hotel Trades Council. Also, many of the cards were only signed by union supporters on the day they went on strike or thereafter. In the Supreme Court of Florida it was the view of counsel for the respondents that only those who had signed cards for Local 255 prior to going on strike should be counted as having designated the union. Counting only such of those cards as were "properly identified as evidence by those who executed the same," (R. 67) they concluded that only one, two or three employees at each hotel had designated the union prior to the time that picketing began.

We recite these facts not because they are material to the disposition which this Court should make of these cases but only to dispel any suggestion that the number of employees listed by counsel for the respondents has any relation to the number of employees who supported the union's action.

4. The suggestion that the union picketed for the purpose of obtaining an agreement covering all of the employees even though it did not represent a majority.

In their argument respondents attempt to bring this case within the rule of the *Vogt* case (354 U. S. 284) and *Pappas* v. *Stacey* (151 Me. 36, 116 Atl. 2d 497), in both of which it was found that the purpose of the picketing was to induce the employer to interfere with the free exercise of his em-

ployee's right to join or not join the union. (Brief, pp. 23-24.) To the same effect is the argument based upon the Florida "Right to Work" law. (Brief, p. 22.)

This argument wholly ignores the fact that there is not one word of testimony in the record in these cases which could even be argued to support the proposition that the union sought, by its picketing, to coerce the employers into coercing their employees to join the union. Such a purpose was expressly disavowed in several of the cases (R. 311, 946, 1070).

The union's position in all of the cases is fairly reflected in the transcript of the conference which took place between the representatives of the Versailles and the representatives of the union. (R. 354-368) At that conference the employer's representative proposed that the employees be individually interrogated as to whether they desired to be represented by the union. The union would even have agreed to that proposition if the employer would agree to bargain with the union for the particular employees who chose the union in such interrogation. Under the laws of Florida, as set forth above, the union had the right to ask for such representation. But the employer would not agree. The union then proposed that a secret-ballot election be conducted and agreed that it would not request bargaining for those it represented if a majority voted "no." The employer refused. When the union then began to picket, after submitting a certificate from a certified public accountant that the books and records of the union showed that 59 out of the 75 employees in the service trades (R. 313, 323) were members of the union, the Supreme Court of Florida held that such picketing was picketing for an unlawful purpose. (R. 389)

5. The question of mootness.

In their brief, at page 21, counsel for the respondents say that four hotels are no longer involved in the present controversy, those four being the Nautilus, the Lombardy, the Del-

monico and the President Madison. Some of these hotels, they state, have already signed contracts with the union; the owners of others have long since lost their leases and no longer operate the hotels.

Even though respondents have not filed a formal suggestion of mootness with respect to these four cases—and indeed elsewhere (p. 31) appear to complain that we did not file petitions for certiorari in other cases in which collective bargaining agreements have been signed—we regard the matters so raised quite seriously in view of this Court's settled rule that it will not decide "moot questions or abstract propositions," *California* v. *San Pablo & T. R. Co.*, 149 U. S. 308, 314.

We wish to make it perfectly clear that none of the questions before the Court are moot or hypothetical. The Nautilus, Lombardy, Delmonico and President Madison present no issues not presented in the other cases. Indeed, we proposed to counsel for respondents that, in order to simplify consideration and argument in this Court, these four cases and others be omitted from the petition for certiorari, with an agreement that they could be disposed of by the Florida courts on the basis of any judgment rendered in the remaining cases.

Any mootness question, therefore, is a technical one and does not affect the issues to be decided, although the fairly considerable costs in the Florida courts and in this Court may be affected by its resolution. As a technical matter, it is not at all clear to us that a permanent injunction against all picketing by a union at the premises of a hotel becomes moot because the union signs a collective bargaining agreement with the employer. To avoid any possible question in that regard, however, counsel for petitioners in this Court did endeavor to eliminate from consideration here any case in which such an agreement was signed by the union. We were originally retained to file petitions for certiorari in all 22 cases. We requested the union to inform us as to whether

any agreements had been signed with any of the 22 hotels, and we were then informed that agreements had been signed in 9 of the cases, as follows:

Monte Carlo Hotel—October 1955

DiLido Hotel—February 1956

Empress Hotel—November 1956

Sorrento Hotel—January 1957

Algiers Hotel—January 1957

Sea Isle Hotel—January 1957

Roney Plaza Hotel—April 1957

McAllister Hotel—April 1957

Biscayne Terrace—June 1957

In addition we ascertained that an agreement had been reached with the Fontainebleau Hotel in January 1957.

In accordance with this information we did not, in the request for an extension of time in which to file petitions for certiorari which we filed in June 1957, include any of the above named cases. The petitions for certiorari covering only 12 cases were subsequently filed on August 12, 1957 and granted on December 16, 1957. After failing to secure agreement from counsel for respondents on a reduction in the number of cases in which the record had to be printed, we filed our designations in all 12 cases and respondents cross-designated in each of them.

Our first knowledge that additional agreements had been signed by the union was obtained from the respondents' brief. Subsequent to receipt of that brief we have ascertained that in two cases such agreements have been signed: the Lombardy on June 18, 1957 and the Nautilus on September 7, 1958. We believe it unfortunate that, at the time the record was designated by us and cross-designated by respondents, we were not aware that an agreement had been signed with the Lombardy and respondents did not

suggest that fact. The agreement with the Nautilus was, of course, signed only recently.

If the Court should be of the opinion that the fact that an agreement has been signed with those two hotels makes the injunctions against picketing at those hotels moot, we have no objection to whatever disposition of those cases the Court would regard as appropriate.

We assume that the two other hotels named by respondents, the Delmonico and the President Madison, are the ones in which the "owners" have lost their leases. In the absence of any further knowledge, however, we are uncertain as to what this signifies and as to whether a change in the lessee of a hotel necessarily voids an injunction which has been entered prohibiting the union from picketing in the vicinity of that hotel. If the union is now free to conduct peaceful picketing at the premises of the Delmonico and the President Madison, we assume that there is no present controversy before this Court in those two cases. There remains, of course, in all four cases, the question of costs in this Court as well as in the Florida courts. See *Heitmuller* v. *Stokes,* 256 U. S. 359, 362-63; *Dyer* v. *City Council of Beloit,* 333 U. S. 825.

Respectfully submitted,

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The respondents in cases No. 5 and 6 above-entitled, jointly and severally respectfully petition the Supreme Court of the United States for a rehearing and modification of the judgment, order or decree rendered by the Court in the above-entitled causes on January 12, 1959.

GROUNDS

The Supreme Court of the United States in its judgment and decision as aforesaid in which it held and decreed that the stipulations referred to in said judgment and opinion, precluded the respondents from contesting in the lower court the question of whether or not the hotels owned by the respondents were engaged severally in interstate commerce, misconceived the intent and purpose of said stipulations and has attributed to said stipulations a meaning not consonant with the aims thereof. Thereby the Supreme Court of the United

States has inadvertently denied to the respondents due process of law, for that respondents severally have been denied the right to the trial of said issue of whether or not the respondents' hotels were severally engaged in interstate commerce.

In the stipulations in the Sax case (R. 35), the Sans Souci case (R. 287), the Lombardy case (R. 650), the Miami Colonial case (R. 784) and the Nautilus case (R. 847), the words therein used, "that final decree be entered by the Chancellor upon the record as *now* made in the light of this stipulation" were intended to refer to a record in which the affidavit of Smith constituted a *proffer,* and nothing more.

A consideration of the circumstances leading up to the execution of the stipulations will establish, we think, that it was not the intention of either side to deprive the respondents of a right to a trial on said issue, in the event of a reversal of the judgments upon the sole ground that the lower court erroneously rejected evidence which was relevant and material to the cause. * (Assignments of Error, ¶3, R. 54-55, 292-293, 396-397, 516-517, 572-573, 655-656, 798-799, 822-823, 875-876, 905-906, 1002-1003, 1086-1087)

The Union, as early as June 13, 1955, had commenced negotiations to obtain stipulations from the attorney for the hotels in all causes not then pending on appeal to the Supreme Court of Florida, in which it was to be agreed that the causes would be submitted to the trial court for final decrees on the record then made. This was prior to the Union's change of position on the question of the jurisdiction of the National Labor Relations Board over the causes pending.

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*Assignments of Error No. 3. "The Court erred (in and by virtue of its final decree) in refusing evidence showing that the cause of action was within the exclusive jurisdiction of the National Labor Relations Board pursuant to Labor Management Act of 1947, and in asserting jurisdiction over the cause of action, all in violation of Article 1, Section 8, and Article 6 of the Constitution of the United States."

A photostatic copy of the first stipulation prepared, signed and submitted by the Union to accomplish the termination of the cases is hereto attached, marked Exhibit "A", and made a part hereof. On the face of this stipulation there appears the pencilled notations of the attorney for the hotels (Marion E. Sibley). Also attached to Exhibit "A" is the Union's suggested final decree adjudicating the causes favorable to the hotels. As a part of Exhibit "A" is a photostatic copy of the reworded stipulation suggested by the attorney for the hotels. The changes are minor—they merely broaden the scope of the record to include "proofs" as well as testimony. Exhibit "A" deals with the early negotiations on the Lombardy Hotel case.

The same procedure was followed in other cases including the Miami Colonial case. A photostatic copy of the signed stipulation of the Union as well as the reworded stipulation of the hotels and the Union's suggested final decree, are hereto attached, marked Exhibit "B", and made a part hereof.

It is to be noted that the negotiations for stipulations commenced on or prior to June 13, 1955. The first supplemental answer was filed injecting the question of the National Labor Relations Board's jurisdiction into the cause in the Saxony Hotel case on *June 28, 1955.* (R. 33). In the Lombardy Hotel Case (Stuyvesant Corp.) no such supplemental answer was filed except by the grace of the stipulation regarding the misplaced answer (R. 648). In the Miami Colonial case (Abe Allenberg), the *Union did not file a supplemental answer raising the question and therefore the question of interstate commerce and the exclusive jurisdiction of the National Labor Relations Board has not been raised in that case and the question is not before the Supreme Court of the United States (R. 659-802).*

Thus, before the arrangements and stipulations for final hearing were consummated, the Union decided to

pose in the record the question of whether or not the hotels were engaged in interstate commerce. The attorneys for the parties continued to seek to solve the problem of stipulations. On July 8, 1955, the Union sought a stipulation in the Saxony Hotel case, the Casablanca Hotel case and the Sea Isle Hotel case (the latter two involved violence and were not brought to the Supreme Court of the United States). A photostatic copy of the original letter from the Union's attorney to the hotels' attorney is attached hereto, marked Exhibit "C" and made a part hereof, together with the stipulation enclosed in the letter. It is to be noted that this enclosed stipulation refers parenthetically to a "supplemental answer". It is obvious that it was prepared after the receipt by the Union attorney of the Hotel attorney's reworded stipulation, because the language has been changed so as to include the word "proofs", which was suggested in the respondents' reworded stipulation.

The letter of July 8th shows that the affidavit of Smith did not accompany the stipulation. In fact, the affidavit referred to in that suggested stipulation was one to be given and executed by Herman and which was in fact executed by Herman on July 13, 1955 (R. 39, 45) and was ultimately attached to the final draft of the stipulation. This Herman affidavit contains nothing in reference to the hotels engaging in interstate commerce.

It is also to be noted that the "Smith affidavit" was not sworn to until the 15th day of November, 1955 (R. 38). Between those dates the stipulation was re-drafted by the Union's attorney in an effort to pose the issue in the record on the question of the hotels engaging in interstate commerce.

Finally, on October 26, 1955, the Union's counsel had come up with language in the stipulation which they thought would pose the issue and at the same time, forestall the necessity, on the part of both counsel, of having to submit evidence pro and con. In other words, it was the desire of the parties to pose the issue but not try it unless it was determined that the issue was ma-

terial and relevant. A photostatic copy of the original letter of Union's counsel, together with enclosed form of stipulation as finally suggested and the form of the Smith affidavit is hereto attached, marked Exhibit "D" and made a part hereof.

It was understood that the objection to the affidavit upon the sole ground that "it was immaterial and irrelevant" would be sustained in a formal decree agreed to by counsel and the question would not be submitted for argument or determination of the court. This procedure was followed.

The record that counsel had in mind as the record *upon which a final decree would be rendered was the record that would exist after the objection to the affidavit had been sustained; and it remained in the case only as a proffer.* There was not the slightest intention on the part of local counsel for the Union or the hotels to preclude the respondents from trying the issue of fact in the event the decree was reversed because the evidence should have been admitted as material and relevant. The "now" put in the last paragraph of the stipulation referred to a record without the affidavit of Smith being a part thereof, but merely a proffer.

We especially direct the attention of the Court to the language of the stipulation: ". . . and in the event the objection is sustained, the affidavit of Clarence Smith shall remain as a part of the record as a proffer and all objections as to form of such proffer *be* and they *are* hereby waived."

If counsel had meant otherwise than here contended, they would have stipulated that the *facts* set forth in the Smith affidavit were true. This would have eliminated the issue now actually pending between the parties. In truth, the opinion of the Supreme Court of the United States assumes that we are dealing with only resort hotels. This is predicated on the affidavit of

Smith, whereas, at least one, Miami Colonial Hotel, is not located on Miami Beach, is located in downtown Miami, and its mode of doing business is far removed from that indicated in the Smith affidavit.

As we have heretofore suggested, no pleading in the Miami Colonial case was ever filed suggesting that the National Labor Relations Board had exclusive jurisdiction of that case.

To further sustain our position in this matter, we respectfully call the Court's attention to the record in the San Marino Hotel case. No affidavit of Smith was tendered in that case. The stipulation (R. 514) provided that the testimony and evidence "heretofore introduced in this cause" shall be presented to the court for the rendition of a final decree. No proofs were introduced in evidence to establish that the San Marino was engaged in interstate commerce. The court so found after a trial of the case (R. 434) as follows:

> "The allegations of the Supplemental Answer alleging interstate commerce and averring that this Court does not have jurisdiction were not supported by evidence. This Court has jurisdiction of the parties and the subject matter."

It is true that attached as a part of the pleading there was an affidavit signed by Herman (R. 419). This, however had not been *"introduced"* in evidence. So, in order to pose the question of whether or not the hotel was engaged in interstate commerce, counsel for the Union prepared the final decree for the court and provided as is shown by a photostatic copy of the original of said decree hereto attached, marked Exhibit "E" and made a part hereof, as follows: (R. 515)

> "Ordered, Adjudged and Decreed that the Motion To Dismiss for lack of jurisdiction urged by the Defendant in its Supplemental Answer alleging that Plaintiff is engaged in interstate commerce be and

> the same is hereby stricken together with that portion of the affidavit of Dave Herman in support thereof."

Actually, this did not under any mode of legal procedure really pose the question, because no motion to dismiss for lack of jurisdiction had been filed by the Union. Secondly, no evidence had been introduced at the trial as provided in the stipulation between the parties (R. 514) to prove that the hotel was engaged in interstate commerce. No affidavit of Smith was even tendered.

We respectfully urge that the opinion and decision of the Supreme Court of the United States in that case should do no more than reverse the court on a ruling on the pleadings, which of necessity, requires the cause to be remanded for further trial. Actually, the question is not even *posed* or sufficiently *feigned* in the San Marino case.

In the Versailles Hotel case, it appears that the final decree was also prepared by the attorneys for the Union. A photostatic copy of such final decree is hereto attached, marked Exhibit "F", and made a part hereof. The stipulation in re final hearing in that case (R. 393) does not tender the Smith affidavit, although attached as a part of the Union's answer, and therefore, a part of a pleading in the cause, is the affidavit of David Herman (R. 323), which contains sworn statements indicating that the hotel is engaged in interstate commerce (R. 330-331). This pleading was filed on July 6, 1955. The case apparently was tried on application for temporary injunction on affidavits, which is permissible on interlocutory hearings. (R. 340-378)

The stipulation in re final hearing provides that each of the parties would "produce as witnesses the several affiants who have heretofore made affidavits in this cause and that the respective witnesses would testify according to their respective affidavits". This language undoubtedly is broad enough to cover the Herman affidavit which is part of the answer of the Union.

In the Martinique Hotel case, the final decree was also prepared by the Union's attorney. A photostatic copy of said final decree is hereto attached, marked Exhibit "G" and made a part hereof. In that case, hearing on temporary injunction was upon affidavit. Mr. Herman's affidavit was admitted before the court for the purpose of that hearing (R. 1072) and it was sufficient to support the supplemental answer indicating that the Martinique Hotel was engaged in interstate commerce. The stipulation in re final hearing (R. 1084) appears to be broad enough to include the Herman affidavit as a part of the record.

The Union's attorneys prepared the final decree in the Robert Richter Hotel case, as shown by a photostatic copy thereof, hereto attached, marked Exhibit "H", and made a part hereof. This case was also heard on interlocutory application upon affidavit. The Herman affidavit (R. 984) sufficiently indicates that the Robert Richter Hotel was engaged in interstate commerce. The stipulation (R. 1000) is broad enough to include this affidavit as a part of the testimony on final hearing.

It may be that upon a trial of the issue of whether or not these hotels were involved in interstate commerce, within the meaning of the National Labor Relations Act, the respondents will find themselves unable to successfully sustain the issue. This does not justify the denial to them of the right to trial thereon. See, *Saunders v. Shaw, 244 U. S. 317, 37 S. Ct. 638.* In that case, the rule is stated:

> "Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principal of the Myles Salt Co. Case that to remand it would be an empty form,—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in."

CONCLUSION

We respectfully petition the Supreme Court of the United States to modify its opinion and decision in such fashion that the respondents' right be preserved to a trial of the issue of whether or not the hotels severally were involved in interstate commerce.

Respectfully submitted,

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Counsel for respondents hereby certify that the above and foregoing Petition for Rehearing is presented in good faith and not for delay.

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